Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services	)	WC Docket No. 04-246
	)	
Petition for Forbearance Under 47 U.S.C. Section 160(c) from Pricing Flexibility Rules for Fast Packet Services	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 22, 2005 **Released: October 14, 2005**

By the Commission: Commissioners Copps and Adelstein concurring and issuing separate statements.

I. INTRODUCTION

1. In this Order, we waive certain requirements under our price cap rules and regulations to allow Verizon to exercise pricing flexibility for advanced services that rely on packet technology similar to the pricing flexibility that it has for other special access services.[1] Specifically, this waiver grants Verizon Phase I pricing flexibility for these services where it already has qualified for Phase I or II pricing flexibility for other special access services. It further allows Verizon to apply for Phase II pricing flexibility for these packet-based advanced services in the same areas by satisfying the competitive triggers set forth in our pricing flexibility rules.

[1] According to Verizon, these services are generally made up of packet switching equipment and facilities, such as Frame Relay or ATM switches, which reach the end user through a special access line connection, but Verizon excludes DSL services from its request. *See* Verizon Petition for Waiver to Allow It to Exercise Pricing Flexibility for Advanced Services Where the Commission Has Granted Relief for Traditional Special Access Services, WC Docket No. 04-246, at 1 (filed June 25, 2004) (Verizon Waiver Petition) (citing 47 C.F.R. § 69.729; *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 98-157, CCB/CPD File No. 98-63, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14310, para. 173 (1999) (*Pricing Flexibility Order*), *aff'd*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001)). Verizon filed its petition on behalf of the affiliated local telephone companies of Verizon Communications Corp. Verizon's waiver petition was filed simultaneously with a petition, in the alternative, asking the Commission to forbear from enforcing section 69.729 of the Commission's rules and paragraph 173 of the *Pricing Flexibility Order.* Verizon subsequently withdrew that petition. Letter from Dee May, Vice President - Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-246 (filed Sept. 22, 2005).

II. BACKGROUND

2. Verizon asks us to waive certain rules governing pricing flexibility for price cap local exchange carriers (LECs). Following passage of the Telecommunications Act of 1996,[2] the Commission adopted the *Pricing Flexibility Order*, which established a framework for granting price cap LECs flexibility in the pricing of certain interstate access services as competition for those services develops.[3] This pricing flexibility is available only for certain access services that are subject to price cap regulation.[4] Pursuant to rules established in the *Pricing Flexibility Order*, carriers may qualify for pricing flexibility for specific services in two phases by satisfying certain competitive showings designed to demonstrate that market conditions in a particular Metropolitan Statistical Area (MSA) warrant the relief they seek.[5]

3. The Commission also established a procedure for new services to qualify for pricing flexibility. Section 69.729 of the Commission's rules enables a LEC to gain pricing flexibility for a new service not yet incorporated into a price cap basket by demonstrating in a pricing flexibility petition that the new service "would be properly incorporated into one of the price cap baskets and service bands for which the price cap LEC seeks pricing flexibility."[6] Paragraph 173 of the *Pricing Flexibility Order* separately explains how a price cap LEC may gain pricing flexibility for a new service if that service falls within a price cap basket and service band for which the LEC already has been granted pricing flexibility. In that case, the LEC may demonstrate in its annual access tariff filing that the new service would properly be incorporated into a price cap basket or service band for which the carrier previously was granted pricing flexibility.[7]

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* We refer to these Acts collectively as the "Communications Act" or the "Act."

[3] *Pricing Flexibility Order*, 14 FCC Rcd at 14225, para. 3.

[4] *See generally id*. at 14224 n.1; 47 C.F.R. §§ 69.709(a), 69.711(a), 69.713(a) (listing services for which LECs may seek pricing flexibility). Not all services offered by price cap LECs are in price caps. Upon the adoption of price cap regulation in 1990, the Commission excluded some services from this system of regulation. *Policy and Rules Concerning Rates for Dominant Carriers,* CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6810, paras. 191-97 (1990) (*LEC Price Cap Order*), Erratum, 5 FCC Rcd 7664 (Com. Car. Bur. 1990), *modified on recon*., 6 FCC Rcd 2637 (1991)*, aff'd sub nom. National Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir 1993).

[5] *See generally* 47 C.F.R. § 1.774; 47 C.F.R. Part 69, Subpart H (Pricing Flexibility Rules). To obtain Phase I relief for interstate special access and dedicated transport services other than channel terminations between a LEC end office and an end user's customer premises, a price cap LEC must demonstrate that unaffiliated competitors have collocated in at least 15 percent of the LEC's wire centers within an MSA or collocated in wire centers accounting for 30 percent of the LEC's revenues from these services within the MSA and that at least one of these collocators is using competitive transport facilities. 47 C.F.R. § 69.709(b); *see Pricing Flexibility Order*, 14 FCC Rcd at 14234-35, para. 24. To obtain Phase II relief for these services, the trigger thresholds are unaffiliated collocation in 50 percent of the LEC's wire centers or in wire centers accounting for 65 percent of the LEC's revenues from these services within the MSA and at least one collocator using competitive transport. 47 C.F.R. § 69.709(c); *see Pricing Flexibility Order*, 14 FCC Rcd at 14235, para. 25. Higher thresholds apply for obtaining Phase I or II relief for channel terminations between a LEC's end office and an end user customer. 47 C.F.R. §§ 69.711(b), (c).

[6] 47 C.F.R. § 69.729(a). Carriers must, nevertheless, satisfy pricing flexibility triggers for "new" end user channel termination services. *See* 47 C.F.R. § 69.729(b).

[7] *Pricing Flexibility Order*, 14 FCC Rcd at 14310, para. 173.

4. On June 25, 2004, Verizon filed a petition asking us to waive section 69.729 of the Commission's rules and paragraph 173 of the *Pricing Flexibility Order*.[8] Verizon requests that the Commission "waive . . . its rules that currently prevent [it] from exercising the same degree of pricing flexibility for advanced packet switched broadband services . . . other than DSL . . . that it already can exercise with respect to traditional special access services in areas where the Commission has previously granted pricing flexibility for those services."[9] Through its petition, Verizon seeks the right to exercise pricing flexibility for certain services that use packet technology (which it refers to as "fast packet" or advanced services) in areas where it has been granted flexibility for other special access services.[10] Verizon asserts that, to respond to competition effectively, it requires the flexibility to offer individually negotiated contracts for these advanced services and to adjust prices, as it deems necessary, for different customer and market segments.[11]

5. The advanced services at issue in Verizon's petition originally were offered through its telephone companies and these services were subject to price cap regulation.[12] As a condition of the Bell Atlantic/GTE merger, however, the Commission ordered Verizon to offer its advanced services through a separate advanced services affiliate until such time as specified in the sunset provisions of the merger order.[13] Thus, in 2001, Verizon began transferring these services to a separate affiliate to comply with this condition. When Verizon's affiliate, Verizon Advanced Data Inc. (VADI), offered the advanced services, they were not subject to price cap regulation, which applies only to Bell Operating Companies, GTE, and other LECs electing such regulation.[14] In the *ASCENT* decision, issued later that year, the United States Court of Appeals for the District of Columbia Circuit ruled that incumbent LEC affiliates, such as VADI, were successors or assigns of incumbent LECs under section 251(h) of the Act.[15] Under the terms of the *Bell Atlantic/GTE Merger Order*, Verizon had the right to reintegrate the affiliate with its operating company if a court issued such a ruling.[16]

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[8] *See* Verizon Waiver Petition at 1 (citing 47 C.F.R. § 69.729; *Pricing Flexibility Order*, 14 FCC Rcd at 14310, para. 173).

[9] Memorandum of Points and Authorities in Support of Verizon's Petition for Waiver of Pricing Flexibility Rules and Contingent Petition for Forbearance at 1 (Verizon Memorandum).

[10] The petition applies to the following services: Frame Relay, Asynchronous Transfer Mode Cell Relay, Internet Protocol-Virtual Private Network, Transparent Local Area Network, and Exchange Access Switched Multi-Megabit Data Services. *See id*. at 1, 14, Attachment B; Letter from Joseph Mulieri, Vice President - Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-246 (filed June 8, 2005) (Verizon June 8 *Ex Parte* Letter).

[11] Verizon Memorandum at 7, 12; Verizon Reply Comments at 14-15, Declaration of Thomas F. Maguire at paras. 6-12.

[12] *See* Letter from Joseph Mulieri, Vice President - Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-246, at 4 (filed June 27, 2005) (Verizon June 27 *Ex Parte* Letter).

[13] *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License,* CC Docket No. 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032, 14038-39, para. 5; 14265-89, App. D (2000) (*Bell Atlantic/GTE Merger Order*).

[14] *See* Verizon Memorandum at 2-3; 47 C.F.R. § 61.41; *LEC Price Cap Order,* 5 FCC Rcd at 6818-21, paras. 257-84.

[15] *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) (*ASCENT*); 47 U.S.C. § 251(h).

[16] *Bell Atlantic/GTE Merger Order*, 15 FCC Rcd at 14153, para. 265.

6. Verizon chose to reintegrate its affiliate and sought permission to expedite the sunset of the separate affiliate requirements and transfer the services back to its telephone company.[17] On September 26, 2001, the Common Carrier Bureau granted Verizon's request, finding that reintegration of these assets on an accelerated basis was in the public interest and noting that the *ASCENT* decision would, in any event, have caused the separate affiliate condition to terminate automatically in January 2002.[18] For the last four years, Verizon has sought and obtained limited waivers of section 61.42(g) of the Commission's rules with respect to the assets transferred from VADI to Verizon.[19] That rule provides that new services must be included in the first annual price cap tariff filing following completion of the base period in which they are introduced.[20] Although Verizon has sought and obtained waivers to keep its advanced services out of price caps, it nevertheless has to comply with other pricing regulation such as filing tariffs with cost support.[21]

7. In June 2004, Verizon filed the instant petition seeking to exercise pricing flexibility for these advanced services, which have not been incorporated into price caps and, as such, are ineligible for pricing flexibility.[22] Verizon asserts that BellSouth has incorporated comparable advanced services into its price cap offerings and subsequently received pricing flexibility for these services.[23] Verizon also notes that SBC, which offers advanced services through its separate affiliate, is also able to exercise pricing flexibility for comparable services.[24] Verizon contends that a waiver is justified given its unique

[17] Letter from Gordon R. Evans, Vice President, Federal Regulatory, Verizon, to Dorothy Attwood, Chief, Common Carrier Bureau, CC Docket No. 98-184 (filed May 1, 2001). The Bell Atlantic/GTE merger, which was completed on June 30, 2000, created Verizon Communications.

[18] *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License,* CC Docket No. 98-184, Order, 16 FCC Rcd 16915, 16918, para. 6 (Com. Car. Bur. 2001). The Common Carrier Bureau became the Wireline Competition Bureau in 2002 as part of organizational changes at the Commission. *See generally Establishment of the Media Bureau, the Wireline Competition Bureau and the Consumer Governmental Affairs Bureau*, Order, 17 FCC Rcd 4672 (2002). The separate affiliate condition automatically terminated nine months after the date of a final and non-appealable judicial decision determining that the separate advanced services affiliate is a "successor or assign" of the incumbent. *Bell Atlantic/GTE Merger Order*, 15 FCC Rcd at 14288-89, App. D, para. 11.c.

[19] *E.g.,* Verizon Petition for Waiver of the Price Cap Rules, WCB/Pricing File No. 02-16 (filed Nov. 30, 2001); *see also Petition for Waiver of the Commission's Price Cap Rules For Services Transferred from VADI to the Verizon Telephone Companies*, WCB/Pricing File No. 05-17, Order, 20 FCC Rcd 8900, 8901, para. 3 (Wireline Comp. Bur. 2005) (*2005 Waiver Order*) (and orders cited therein).

[20] 47 C.F.R. § 61.42(g).

[21] *See* 47 C.F.R. Part 61, Subparts E & F.

[22] *See* Verizon Waiver Petition at 1 (citing 47 C.F.R. § 69.729; *Pricing Flexibility Order*, 14 FCC Rcd at 14310, para. 173).

[23] Verizon Memorandum at 10; Verizon Reply at 19 n.29 (citing, *inter alia*, *BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services,* CC Docket No. 01-22, Memorandum Opinion and Order, 16 FCC Rcd 18174, 18181, para. 15 (2001)).

[24] Verizon Memorandum at 10. Although SBC has not been granted pricing flexibility for its provision of similar services, SBC was granted forbearance from our tariffing rules in connection with its provision of advanced services through a separate affiliate. *See generally Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Memorandum Opinion and Order, 17 FCC Rcd 27000 (2002). An SBC petition pending before the Commission requests relief similar to the relief Verizon seeks here. *See* SBC Communications Inc. Petition for Waiver of Section 61.42 of the Commission's Rules, WC Docket No. 03-250 (filed Dec. 9, 2003). In comments supporting Verizon's petition, SBC requests that any relief granted to Verizon "be extended to all dominant LECs offering advanced services that rely on packetized technology." SBC Comments at 2. We intend to address SBC's petition separately.

circumstances.[25] More specifically, Verizon argues that, because its advanced services were transferred from VADI back to Verizon and have been temporarily excluded from price caps as a result of waivers, it has been unable to exercise pricing flexibility under the Commission's rules.[26] According to Verizon, because advanced services are more competitive than special access services, for which it has already made the requisite competitive showings, it should not be required to put advanced services into price caps or make any additional market-by-market competitive showings.[27] Verizon contends that its previous grants of pricing flexibility for special access services justify extending the same relief to its advanced services.[28]

III. DISCUSSION

8. The Commission may waive its regulations for good cause shown.[29] In general, the waiver request must demonstrate special circumstances warranting a deviation from the general rule, and that such a deviation will serve the public interest.[30] For the reasons discussed below, we conclude that good cause exists to permit Verizon to exercise pricing flexibility for advanced services that rely on packet technology similar to the pricing flexibility relief that it has for other special access services.[31] We thus grant a waiver enabling Verizon to exercise Phase I pricing flexibility for these services where it already has qualified for Phase I or II pricing flexibility for its special access services. That is, we waive sections 1.774, 69.709, 69.711, and 69.727 of the Commission's pricing flexibility rules for these packet-based services.[32] Where Verizon has not yet qualified for pricing flexibility, it may include these advanced services in any future pricing flexibility petitions, but it must support such petitions with data regarding its advanced services and must satisfy the competitive showings set forth in our rules.[33] However, we deny Verizon's request to the extent it seeks a waiver of section 69.729 of the

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[25] Verizon Waiver Petition at 3; Verizon Memorandum at 13.

[26] Verizon Memorandum at 13-14; Verizon June 27 *Ex Parte* Letter at 1-2.

[27] *See* Verizon Memorandum at 7-12; Verizon June 27 *Ex Parte* Letter at 3-4.

[28] Verizon Memorandum at 5-7.

[29] 47 C.F.R. § 1.3.

[30] *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

[31] As an initial matter, we find it unnecessary for Verizon to first include these services in price caps before they are eligible for pricing flexibility. As described in paras. 5-6, *supra,* the advanced services at issue were removed from price caps for reasons unrelated to whether such services belong there. The Bureau has granted waivers keeping these services out of price caps because the appropriate regulatory treatment of advanced services is a question currently before the Commission in pending rulemaking proceedings such as those initiated by the *Dom/Non-Dom NPRM* and the *Special Access NPRM*. *See generally Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd. 22745 (2001) (*Dom/Non-Dom NPRM*); *Special Access Rates for Price Cap Local Exchange Carriers,* WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (*Special Access NPRM*). We find that these procedural circumstances should not act to preclude Verizon from obtaining pricing flexibility for these services.

[32] Specifically, we waive the requirement that services must be in price caps to be eligible for pricing flexibility for Phase I and II relief and the following rules as applicable to Phase I relief: 47 C.F.R. §§ 1.774 (requiring petitions for pricing flexibility to include collocation and wire center data by MSA and to "show that the price cap LEC has met the relevant thresholds"), 69.709(b) (establishing Phase I triggers for special access services other than channel terminations), 69.711(b) (establishing Phase I triggers for channel terminations between LEC end offices and the customer premises), and 69.727(a) (to the extent that it requires price cap LECs to satisfy Phase I triggers).

[33] *See, e.g.*, 47 C.F.R. § 1.774; 47 C.F.R. Part 69, Subpart H.

Commission's rules and paragraph 173 of the *Pricing Flexibility Order*[34] because both of these rules apply to pricing flexibility for new services and do not apply here.[35]

9. We find that the waiver we grant serves the public interest because it promotes competition for advanced services, resulting in more choices and better prices for customers. We also conclude that the administrative and regulatory burdens associated with requiring Verizon to satisfy an additional competitive showing for Phase I relief outweigh the benefits of such a showing.

10. The advanced services at issue, which Verizon offers through Tariff 20, are purchased by enterprise customers that require fast-packet applications to transmit their own data.[36] According to Verizon, these services are generally made up of packet switching equipment and facilities, such as Frame Relay or ATM switches, which reach the end user through a special access line connection.[37] These two parts combine to form a high capacity data network.[38] Because Verizon's advanced services are dedicated facilities that enable an end-user customer to connect two or more of its locations, they are special access services.[39] The special access line consists of a "channel termination" facility between the end user and the Verizon office serving the end user (such as a Local Serving Office or a Frame Relay/ATM Serving Office), and may include a dedicated transport facility between Verizon's offices (such as between a Local Serving Office and a Frame Relay/ATM Serving Office).[40] Under the *Pricing Flexibility Order*, higher thresholds apply for obtaining Phase I or II relief for channel terminations between an end-user customer and a LEC's office serving that end user, than apply to other special access facilities (also referred to as non-channel terminations).[41] Verizon's advanced services utilize a channel termination facility between the end user and Verizon's office serving that end user, and the equivalent of non-channel termination facilities provide the rest of the service.

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[34] 47 C.F.R. § 69.729; *Pricing Flexibility Order*, 14 FCC Rcd at 14310, para. 173.

[35] *See* 47 C.F.R. § 61.3(x) (defining a new service as one that was "not previously offered by the carrier involved and that enlarges the range of service options available to ratepayers"). The Commission affords special treatment for new services for a period of six to 18 months during which time the carrier develops demand data to enable it to incorporate the service into a price cap index. *LEC Price Cap Order*, 5 FCC Rcd at 6825, para. 319; *see* 47 C.F.R. § 61.42(g). In this case, the services at issue have been available for years. Verizon June 8 *Ex Parte* Letter at 1.

[36] Verizon Reply at 8 n.13.

[37] *See* Verizon Memorandum at 11; Verizon Reply at 1; Verizon June 27 *Ex Parte* Letter at 3. Verizon's rate elements for Frame Relay and ATM packet switching include a user network interface (UNI) port and access line, a UNI port only, a permanent virtual connection, and a network-to-network interface (NNI) port only. Letter from Joseph Mulieri, Vice President - Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 04-246 at 2-3, 5, Attach. A, page 9, Attach. B, page 1 (filed Aug. 4, 2005) (Verizon Aug. 4 *Ex Parte* Letter). Verizon states that AT&T does not purchase these rate elements in Tariff 20 to provision AT&T packet-switched services. *See, e.g.,* Verizon Reply at 1.

[38] Verizon June 27 *Ex Parte* Letter at 3.

[39] There are two basic categories of access services: switched access services and special access services. Switched access services use local exchange switches to route originating and terminating toll calls. *See Pricing Flexibility Order*, 14 FCC Rcd at 14226, para. 8. Special access services, on the other hand, do not use local switches; instead they employ dedicated facilities that run directly between the end user and the interexchange carrier (IXC) point of presence (POP) or between two end-user locations. *See id.* A POP is the physical point where an IXC connects its network with the LEC network.

[40] *See* Verizon Aug. 4 *Ex Parte* Letter at Attach. B, page 1; *see also Pricing Flexibility Order*, 14 FCC Rcd at 14278, para. 100.

[41] *Pricing Flexibility Order*, 14 FCC Rcd at 14278, 14299-300, paras. 100, 150.

11. In weighing whether to require independent competitive showings under the pricing flexibility rules for the services at issue, we find that the administrative burdens and delay imposed by such a showing are not in the public interest.[42] The *Pricing Flexibility Order* sought to eliminate administrative burdens and delays in providing pricing flexibility through showings demonstrating a sufficient competitive presence to warrant relief.[43] Although competitors do not have to rely on Verizon's packet switching to provide their own advanced services to customers,[44] AT&T argues that it and other competitors must purchase special access channel termination facilities from Verizon to reach the end-user customer.[45] Packet switching providers such as AT&T purchase Verizon's special access facilities as inputs to their own retail advanced services. In particular, these providers, and Verizon itself, already use channel termination and interoffice facilities purchased out of tariffs other than Tariff 20.[46] This proceeding does not give Verizon any additional authority to change prices for these facilities. Moreover, as discussed further below, Verizon has satisfied the competitive showings and thus has already demonstrated that a sufficient competitive presence warrants a grant of pricing flexibility for these facilities.[47] These facilities are also offered in Tariff 20, the tariff at issue in this proceeding.[48] Therefore, requiring Verizon to satisfy a separate competitive showing for the channel termination and interoffice facilities offered under Tariff 20 for the provision of advanced services would serve no additional purpose and is unnecessary for Phase I relief.[49] Such a duplication of work here would merely create undue administrative and regulatory burdens and result in a waste of resources.

12. According to AT&T, the principal risk to competition occurs because Verizon controls the access facilities that AT&T uses to provide its own retail advanced services.[50] Specifically, AT&T

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[42] To make a new competitive showing for the advanced services, Verizon would have to re-gather collocation data and re-prove satisfaction of the triggers under our rules for each of the MSAs at issue. Verizon Memorandum at 8 ("To achieve this, Verizon would have to, among other things, survey collocation in hundreds of offices, re-generate substantial amounts of revenue data, and serve all of its collocators with notice of this process."). Then, Verizon would have to file additional pricing flexibility petitions. These petitions would be subject to an administrative process that takes more than 90 days. *See* 47 C.F.R. § 1.774(f). Commission staff would have to review the petitions and determine whether the data provided by Verizon satisfy the pricing flexibility rules. Thus we disagree with the New Jersey Ratepayer Advocate's contention that there is no evidence of undue administrative burden or delay. New Jersey Ratepayer Advocate Comments at 3.

[43] *Pricing Flexibility Order*, 14 FCC Rcd at 14267, 14274, paras. 83, 94.

[44] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17321-23, paras. 537-39 (2003), Errata, 18 FCC Rcd 19020 (2003), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 125 S. Ct. 313 (2004).

[45] AT&T Opposition at 19-21.

[46] An access line is the equivalent of an end user channel termination and may include interoffice facilities. Access lines may be purchased out of Verizon's other interstate access tariffs such as, depending upon the customer location, Tariff F.C.C. No. 1 or 11.

[47] *See infra* para. 16.

[48] *See supra* para. 10 & n.37.

[49] We note, however, that, to the extent that Verizon defines its advanced service as an end-to-end service and seeks pricing flexibility for the entire service, Verizon must have qualified for Phase I or II relief for *both* the channel termination and non-channel termination parts in all MSAs in which the service is provisioned in order for each part of the end-to-end service to qualify for pricing flexibility.

[50] AT&T Opposition at 19-24; AT&T Reply at 6-7.

claims that the grant of a waiver could result in discriminatory pricing by Verizon that is anticompetitive and causes a "price squeeze."[51] AT&T disputes the competitive nature of the advanced services marketplace[52] and asserts that Verizon has not shown that the markets for the services at issue are competitive.[53] AT&T argues that the Commission should not grant pricing flexibility here "because the Bells' market behavior following grants of pricing flexibility for traditional special access services confirms the noncompetitive nature of special access markets."[54]

13. AT&T's complaints essentially restate allegations that special access rates are anticompetitive, which AT&T has already raised in a petition for rulemaking that the Commission is addressing through the *Special Access NPRM*.[55] The Commission recently opened this proceeding and is considering comments to resolve these and related issues. For example, the Commission recognized the increased importance of special access services because they may serve as a key input for many IXC service offerings, and it will examine the regulatory framework that should apply to special access charges.[56] The Commission will also consider whether the available marketplace data support maintaining, modifying, or repealing the Commission's pricing flexibility rules for special access services.[57] At the same time that the Commission initiated this rulemaking proceeding, it found that there was insufficient record data to justify imposing a moratorium on pricing flexibility applications, and accordingly, denied AT&T's request for such a moratorium. Likewise, here we reject AT&T's arguments that challenge special access rates, and whether the *Pricing Flexibility Order* adequately "test[s] for the presence of price-constraining competition."[58] The Commission is establishing a comprehensive record in the *Special Access NPRM*, which will enable it to assess any "price squeeze" issues and whether action is necessary to ensure that rates for special access services remain just and reasonable.[59] Thus, the *Special Access NPRM* is the appropriate proceeding to address AT&T's arguments concerning special access competition and rates.[60] In any event, AT&T poses a fact-intensive, highly contentious allegation that

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[51] AT&T Opposition at 20-21 ("[Verizon's] ability to charge special access rates that are multiples of their forward-looking costs creates the textbook opportunity for a price squeeze against competitors dependent on special access services as an input. Access to last-mile transmission facilities is a 'necessary input' for a broad array of local and long distance business services, including advanced, high speed packet-based services. Verizon can create an anticompetitive price squeeze by charging rivals a greater margin for access than the ILEC earns on its own integrated end-user services, and thereby deter efficient competitive supply of the retail service."). AT&T claims that "Verizon is seeking to ensure that it can squeeze its retail competitors at both the wholesale level (by increasing input costs) and at the retail level (by selectively reducing retail prices for particularly important accounts)." *Id.* at 21; *see also* AT&T Reply at 6-7.

[52] AT&T Reply at 6-7.

[53] AT&T Opposition at 15-20; AT&T Reply at 6.

[54] AT&T Reply at 7; *see also* AT&T Opposition at 24-27.

[55] *See generally Special Access NPRM*, 20 FCC Rcd 1994. We note that the Commission incorporated the record compiled in response to AT&T's petition into the proposed rulemaking proceeding. *See id.* at 1996-97, paras. 5, 6.

[56] *Id.* at 1995-96, paras. 1, 3.

[57] *Id.* at 1995-97, paras. 1, 5.

[58] AT&T Opposition at 25.

[59] We have stated previously that we will not consider collateral challenges to the *Pricing Flexibility Order* when considering pricing flexibility relief. *See, e.g., Verizon Petition for Pricing Flexibility for Special Access Services,* WCB/Pricing File No. 05-11, Memorandum Opinion and Order, 20 FCC Rcd 9809, 9814, para. 11 (Wireline Comp. Bur. 2005).

[60] As noted, AT&T complains that advanced services should not be included in price caps. AT&T Opposition at 8. This is also an open issue in the pending rulemaking proceeding. *See Special Access NPRM*, 20 FCC Rcd at 2013, para. 52.

turns on economic analysis, but it offers no significant data or analysis to support its assertion. Accordingly, we find that AT&T has not presented sufficient evidence in this proceeding to establish a price squeeze.

14. We likewise decline to resolve AT&T's arguments regarding the competitive nature of the packet-switching market in this proceeding, as such a complex analysis is better suited to rulemaking proceedings such as the *Dom/Non-Dom NPRM* where, indeed, such issues are already clearly before the Commission.[61] We further disagree with commenters that contend the grant of a waiver here could act to prejudge future policies as to whether advanced services should be accorded "non-dominant" regulatory treatment in the pending *Dom/Non-Dom NPRM.*[62] A request for pricing flexibility relief differs from a request for "non-dominant" treatment. Pricing flexibility relief, as the Court of Appeals stated, "is narrower in reach."[63] The *Pricing Flexibility Order* specifically states that even the greatest pricing flexibility relief that is granted under Phase II "will not grant incumbent LECs all the regulatory relief . . . afford[ed] to non-dominant carriers."[64] The Commission's pricing flexibility policy is based on a desire to avoid administratively burdensome proceedings in making determinations about competition and to provide a bright-line rule to guide the industry.[65] Thus, as the court noted, a grant of pricing flexibility does not require "a painstaking analysis of market conditions such as that which is required when a LEC seeks classification as a non-dominant carrier."[66] Indeed, this kind of comprehensive market analysis is being conducted in the *Dom/Non-Dom NPRM* and will assist the Commission in determining the overall regulatory treatment of advanced services. Further, as Verizon recognizes, the relief that it requests here "is also only interim in nature. There are other ongoing . . . proceedings to determine how these and other broadband services will be treated going forward."[67] Therefore, our grant of a waiver to allow Verizon limited pricing flexibility relief based on the record here is not intended in any way to detract from a full and fair consideration of whether advanced services should receive broader "non-dominant" regulatory treatment in the future.[68]

15. Finally, we believe that the waiver that we grant in this proceeding will not harm the policies underlying our price cap and pricing flexibility rules. The price cap system, adopted in 1990, was designed to replicate some of the efficiency incentives present in competitive markets and to act as a transitional regulatory mechanism en route to full competition.[69] The Commission established the pricing flexibility framework to permit price cap LECs greater pricing flexibility as greater competition develops.[70] The policy underlying Phase I pricing flexibility is to allow incumbent LECs to respond to

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[61] *See Dom/Non-Dom NPRM*, 16 FCC Rcd at 22748, para. 7.

[62] AT&T Opposition at 7 (contending that a grant of Verizon's petition "would entirely subvert" the *Dom/Non-Dom NPRM*); *see also* AT&T Reply at 2; Sprint Opposition at 2, 6.

[63] *See AT&T Corp. v. FCC,* 236 F.3d 729, 738 (D.C. Cir 2001).

[64] *Pricing Flexibility Order*, 14 FCC Rcd at 14300, para. 151 (explaining that Phase II regulatory relief still requires incumbent LECs to file generally available tariffs, is limited to certain services and areas, and will be granted only upon satisfaction of competitive triggers).

[65] *Id.* at 14276, para. 96; *see generally WorldCom, Inc. v. FCC*, 238 F.3d 449.

[66] *WorldCom, Inc. v. FCC*, 238 F.3d at 459.

[67] Verizon June 27 *Ex Parte* Letter at 2 (citing *Dom/Non-Dom NPRM*, 16 FCC Rcd 22745; Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Their Broadband Services, WC Docket No. 04-440 (filed Dec. 20, 2004)).

[68] Verizon specifically states that its request here "is not seeking to have the Commission prejudge those [pending broadband] proceedings." *Id.*

[69] *Pricing Flexibility Order*, 14 FCC Rcd at 14227, para. 11.

[70] *Id.* at 14225, para. 3.

competition as it develops, while at the same time using the price cap mechanism to guard against unreasonable rate increases for those customers that do not yet have competitive alternatives.[71] Although Phase I relief for special access services is designed to provide incumbent LECs with greater flexibility in lowering prices for particular customers, our Phase I pricing flexibility rules require price cap LECs to continue to offer special access services at generally available tariffed rates that are subject to price caps.[72] These rates are constrained by price cap regulation to protect customers without competitive alternatives.[73] Accordingly, this safeguard works as intended if services are subject to price caps before becoming eligible for Phase I pricing flexibility. Although Verizon's Tariff 20 rates are not subject to price caps and thus are not constrained by price cap regulation, we are confident that our policy to protect customers without competitive alternatives will not be harmed. Verizon's Tariff 20 rates are subject to Part 61, subparts E and F of the Commission's rules.[74] These rules provide analogous protection against unreasonable rate increases by requiring carriers that seek rate increases to justify such increases by providing cost and other supporting data in the tariff review process.[75] We note that Verizon bases its petition on its contention that the advanced services market is competitive and, in particular, on its need to be able to offer lower rates to meet competition.[76] Accordingly if, after it enters into contracts for these same services on more favorable terms, Verizon should seek to raise its generally available tariffed rates for its advanced services, such a filing would be reviewed with particular scrutiny.

16. We also conclude that our waiver does not undermine the rationale underlying the competitive showings required under our pricing flexibility rules. Those rules require incumbent LECs to meet competitive showings based on collocation and transport data in order to protect competition from exclusionary behavior by these carriers.[77] In the *Pricing Flexibility Order,* the Commission determined that satisfaction of the Phase I triggers in an MSA demonstrates that competitors have made irreversible, or "sunk," investment in the facilities needed to provide the services at issue in the MSA.[78] The Commission used collocation of competitors' equipment in incumbent LEC wire centers as a proxy for competition.[79] Here, Verizon argues that it has previously qualified for pricing flexibility for its special access services in certain areas by satisfying the competitive showings, and that it should, therefore, receive the pricing flexibility for advanced services in the same areas.[80] By satisfying the Phase I triggers, Verizon has demonstrated that competitors have made irreversible investment in the facilities needed to provide special access services in the markets at issue. Accordingly, we find that Verizon demonstrates that sufficient competition exists to warrant pricing flexibility for its advanced services in those markets.

[71] *Id.* at 14225, 14258, paras. 3, 69.

[72] *Id.* at 14295, para. 136.

[73] *Id.* at 14258, para. 69.

[74] *See* 47 C.F.R. Part 61, Subparts E & F.

[75] *Id.*

[76] *See* Verizon Reply at 10.

[77] *Pricing Flexibility Order*, 14 FCC Rcd at 14261-62, para. 77. AT&T also argues that Verizon should make a new competitive showing here because "numerous competitors [have] exit[ed] local markets." AT&T Reply at 8. Even so, the Commission concluded in the *Pricing Flexibility Order* that, once a competitive LEC has made a substantial sunk investment in equipment, that equipment remains available to another firm that can buy the facilities and is capable of providing service in competition with the incumbent. *Pricing Flexibility Order*, 14 FCC Rcd at 14264, para. 80.

[78] *Pricing Flexibility Order*, 14 FCC Rcd at 14263, para. 79.

[79] *Id.* at 14261-62, paras. 77-78; *WorldCom, Inc. v. FCC*, 238 F.3d at 452.

[80] *See, e.g.,* Verizon June 27 *Ex Parte* Letter at 3.

17. We note that Verizon requests that, as part of any waiver, it be able to exercise pricing flexibility for "[a]ll future new services using packet-based technology that will be introduced in FCC Tariff No. 20."[81] The waiver granted herein extends to any new advanced services that Verizon may introduce in this tariff in the future for the MSAs where it has qualified for or seeks pricing flexibility. Specifically, these services will be eligible for treatment as "new services" within the meaning of rule 69.729 and paragraph 173 of the *Pricing Flexibility Order*.[82]

18. We are persuaded, however, that a competitive showing is necessary for Phase II relief. We have previously noted that decisions to grant or withhold pricing flexibility must weigh relative costs and benefits.[83] Any competitive harms resulting from our grant of Phase I relief do not outweigh the potential benefits of promoting competition though this relief. The costs are relatively small because, as discussed above, safeguards prevent unreasonable rate increases. A price cap LEC that receives Phase II relief, however, may offer qualifying services free from the Commission's Part 69 rate structure and Part 61 price cap rules.[84] Although it must continue to make the services generally available through tariffs, its rates are not regulated under Parts 61 or 69.[85] Because we rely on the Phase II triggers to demonstrate that competition for the services at issue within the MSA is sufficient to preclude the incumbent from exploiting any individual market power over a sustained period, it would not be in the public interest to waive these triggers without requiring a separate competitive showing for Verizon's advanced services.[86] Thus, because we waive the general requirement that these services be in price caps before being eligible for pricing flexibility, Verizon may, in a subsequent proceeding, apply for Phase II pricing flexibility for the services at issue in the areas where it already has qualified for pricing flexibility for special access services by satisfying the applicable competitive triggers for its advanced services.

IV. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that, pursuant to authority contained in sections 1, 2, 4(i), 4(j), and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201-205, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, Verizon's petition for waiver of section 69.729 of the Commission's rules, 47 C.F.R. § 69.729, and paragraph 173 of the *Pricing Flexibility Order,* 14 FCC Rcd at 14310, paragraph 173, IS DENIED, as set forth herein.

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[81] Verizon June 8 *Ex Parte* Letter at 3 (excluding Digitial Subscriber Line, government services, promotions, and specialized services).

[82] 47 C.F.R. § 69.729; *Pricing Flexibility Order*, 14 FCC Rcd at 14310, para. 173. As explained above, the new services rules, which permit a carrier to seek pricing flexibility for a service at the time it is introduced, do not apply to the advanced services at issue in Verizon's petition because these services are not new. *See supra* para. 8. Going forward, however, the waiver we grant herein will permit Verizon to qualify for Phase I pricing flexibility for new advanced services it may introduce in the future in areas where it has obtained, or applied for, pricing flexibility for other special access services. *See* 47 C.F.R. § 69.729; *Pricing Flexibility Order*, 14 FCC Rcd at 14310, para. 173. Paragraph 173 contemplates a price cap LEC demonstrating that the new service falls within a price cap basket and service band for which the LEC already has been granted pricing flexibility. *Pricing Flexibility* Order, 14 FCC Rcd at 14310, para. 173. Verizon will be required to make an analogous showing in light of the factors discussed in this order. Likewise, Verizon must comply with the provisions of rules 69.729(a) and (b), as applicable. *See* 47 C.F.R. § 69.729(a), (b).

[83] *See Pricing Flexibility Order*, 14 FCC Rcd at 14297, para. 144.

[84] *See id.* at 14301, para. 153; 47 C.F.R. § 69.727(b).

[85] *See Pricing Flexibility Order*, 14 FCC Rcd at 14301, para. 153.

[86] *Id.* at 14296, 14301, paras. 141, 153.

20. IT IS FURTHER ORDERED that, pursuant to authority contained in sections 1, 2, 4(i), 4(j), and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201-205, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, the *Pricing Flexibility Order* requirement that a service must be in price caps before it is eligible for pricing flexibility IS WAIVED with respect to the advanced services offered under Verizon's F.C.C. Tariff 20, as set forth herein.

21. IT IS FURTHER ORDERED that, pursuant to authority contained in sections 1, 2, 4(i), 4(j), and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201-205, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, waiver of sections 1.774, 69.709(b), 69.711(b), and 69.727(a) of the Commission's rules, 47 C.F.R. §§ 1.774, 69.709(b), 69.711(b), and 69.727(a), IS GRANTED to the extent necessary to allow Verizon to exercise Phase I pricing flexibility with respect to the advanced services offered under Verizon's F.C.C. Tariff 20, as set forth herein.

22. IT IS FURTHER ORDERED that, pursuant to authority contained in sections 1, 2, 4(i), 4(j), 10, and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 160, 201-205, the proceeding with respect to Verizon's petition for forbearance IS TERMINATED in light of its withdrawal of that petition.

23. IT IS FURTHER ORDERED, that, pursuant to authority contained in sections 1, 2, 4(i), 4(j), and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 201-205, and section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), this Order IS EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services; Petition for Forbearance Under 47 U.S.C. Section 160(c) from Pricing Flexibility Rules for Fast Packet Services*, Memorandum Opinion and Order (WC Docket No. 04-246)

I support today's Order. I believe it is an acceptable outcome in light of the D.C. Circuit's decision in *ASCENT* and Verizon's subsequent reintegration of its advanced services affiliate back into its operating company. I limit my support to concurring, however, because I believe that full resolution of these issues requires that the Commission complete its open proceeding examining special access services and pricing flexibility.

CONCURRING STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

Re: *Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services; Petition for Forbearance Under 47 U.S.C. Section 160(c) from Pricing Flexibility Rules for Fast Packet Services*, Memorandum Opinion and Order, WC Docket No. 04-246 (Sept. 22, 2005).

In this Order, we grant Verizon flexibility in pricing certain packet switched services consistent with its existing flexibility for other special access services. I support this waiver based on the current record but note that this order should not be read to prejudge the Commission's on-going review of the special access pricing rules and pricing flexibility regime. In the Commission's comprehensive rulemaking addressing these issues, we have sought comment on whether the Commission's special access framework accurately targets relief to the development of interstate special access competition. I look forward to addressing these issues with my colleagues as expeditiously as possible.